

**From:** [Cy Zaneski](#)  
**To:** [OERegs](#)  
**Subject:** [EXTERNAL] Rulemaking comment  
**Date:** Friday, December 28, 2018 5:23:39 PM  
**Attachments:** [mg\\_info.txt](#)

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Dec. 28, 2018

Regarding: Comments of E&E News on Department of Energy Proposed Rulemaking Critical Electric Infrastructure Information Designation Procedures (Docket #OE-1901-AB44).

The Department of Energy's Office of Electricity (DOE / OE) is proposing changes to Form OE-417 under its Oct. 29 rulemaking to implement the agency's critical electric infrastructure information (CEII) designation authority under the Federal Power Act. The agency proposes to make the OE-417 form, including Schedule 2, the narrative description, protected under the newly-defined CEII standard and thus exempt from disclosure under the Freedom of Information Act (FOIA).

Doing so would essentially prohibit the public from accessing copies of information in the form, which includes data on grid disturbances that surpass certain DOE-defined reporting thresholds, as well as narrative descriptions of grid events that are often clearly in the public interest, given concerns about federal and industry efforts to protect the power grid from emerging cyber, physical and weather-related threats.

DOE has not provided adequate explanation for why these changes are needed, particularly given existing protections under FOIA exemptions 4 and 7, which cover privileged or confidential commercial information and law enforcement records, respectively. Based on records E&E News obtained through public record requests of these OE-417 reports, it appears FOIA already sufficiently protects disclosure of confidential and proprietary data from OE-417 forms, including information on the official to contact for follow-up.

The DOE does not clearly articulate why the agency needs to distinguish between Schedule 1 of the form, which DOE claims in a footnote is "not confidential," and Schedule 2, which DOE proposes "will be protected" upon CEII designation request. In the text of the proposed rule, DOE notes that "in cases in which information on electric incidents and emergencies reported to DOE through Form OE-417 is submitted as a part of a CEII designation request, DOE also proposes to designate such information as CEII automatically upon receipt by the DOE CEII Coordinator." This quote from the rule would appear to supersede the footnote in putting the entirety of the OE-417 form off-limits to FOIA, to include Schedules 1 and 2.

Furthermore, automatically exempting any portion of the OE-417 form from applicable FOIA laws stands at odds with the DOE's stated goal to "harmonize its procedures with the FERC procedures as much as possible." FERC, or the Federal Energy Regulatory Commission, finalized its FAST Act-authorized approach to CEII in November 2016, and notes that for CEII submitters, "failure to provide the justification or other required information could result in denial of the designation and release of the information to the public." (See: 18 CFR 388.113) DOE's proposal to offer blanket CEII approval to OE-417 forms – without attendant justification on the part of the submitting utility or balancing authority – would put DOE's CEII standard in conflict with that of FERC. As DOE's own OE-417 information collection notice points out, "in accordance with the Federal Energy Administration Act, the DOE

provides company-specific protected data to other Federal agencies when requested for official use.” It is not difficult to envision a scenario by which a utility company submits OE-417 data to DOE, expecting CEII protection as proposed in the Oct. 29 rulemaking, only to see information that was contained in OE-417 filings to DOE shared with FERC, where those details could then be released to the public under FOIA due to the lack of attendant, detailed CEII justification on the part of the original DOE submitter. In short, it would be clearer and more appropriate for all parties to let applicable and entirely adequate FOIA law govern handling of OE-417 submissions, rather than attempting to enforce a blanket CEII designation that would not carry over to FERC under that agency’s separate, already-finalized rule.

In addition, DOE in 2014 proposed to revoke public access to Schedule 2 under the Confidential Information Protection and Statistical Efficiency Act of 2002. But based on feedback received, DOE announced it would not proceed with that proposal. DOE in its latest proposal not only fails to acknowledge that it has proposed these additional protections of form OE-417 before and decided those protections were not necessary, but it also fails to show what has changed in the last four years that would warrant adding those protections at this time. Among other points, the FAST Act did not specifically suggest OE-417 information should be protected, but indicated that, if improperly released, CEII data could “be used to impair the security or reliability of the bulk-power system or distribution facilities.” In years of processing OE-417 information and releasing accompanying data, in whole or in part, under FOIA, DOE has not demonstrated that the public release of properly-redacted Schedule 1 or 2 information ever threatened to impair the security of critical infrastructure.

Electric utilities across the U.S. experience thousands of security events daily (see, e.g. Edison Electric Institute & National Rural Electric Cooperative Association comments before the Federal Energy Regulatory Commission dated 2/26/2018; FERC Accession number 20180226-5159), and the basic narrative details of any one such reportable event to DOE cannot reasonably be exploited for competitive purposes by peer organizations subject to the same or highly similar risks. E&E News believes it is in the public interest to have all the relevant details, with appropriate redactions to protect propriety and law enforcement concerns, available to members of the media and by extension, the general public.

Section 2 is where the clarifying details are often provided in the form, without which the public could get a distorted picture of the exact scope of the concern, issue or threat. Through the media and other interested parties, the public would not be able to tell in many instances, for example, whether a reported cybersecurity incident turned out to be a false alarm, or that the many instances listed as physical attacks in the Schedule 1 largely involved copper and other thefts that did not disturb system operations.

The current form makes it explicitly clear that the information provided is subject to public records requests under FOIA, which therefore would mean that any information submitted to DOE prior to any changes taking effect would remain subject to FOIA, particularly since DOE has already provided certain of those documents to various newsgathering organizations, including E&E News.

E&E News urges DOE to not bend to the whims of utilities uncomfortable with the prospect of public light being shown on their performance on an issue that is critical to the public interest – reliability.

E&E News, an independently-owned news organization, delivers original reporting on energy

and environment issues to keep decisionmakers in government, business NGOs and academia informed.

Sincerely yours,

Cyril T. Zaneski

Executive Editor  
E&E News

# DOE reverses plan to revoke access to utility reports after SNL voices opposition

Wednesday, January 14, 2015 5:07 PM ET

By Esther Whieldon *Market Intelligence*

The U.S. Department of Energy reversed its plan to prevent the public from accessing certain parts of utility incident reports after SNL Energy voiced its opposition to the proposal.

For about 14 years, electric utilities and other entities that operate the power system have been required to inform the DOE under Form OE-417 of certain events that could have, or have, impacted electricity system operations. Such events include when someone shoots up a substation or a company suspects it has been the victim of a cyberattack.

The DOE regularly posts short spreadsheet summaries of OE-417 incident reports filed by utilities. But those documents do not include the narrative details of the event, which are most often found in "Schedule 2" of the incident reports. The DOE uses the data from the reports for statistical purposes and in shaping legislative recommendations.

U.S. energy companies face increasing political pressure to bolster their systems against physical and cyber threats, including from what are believed to be nation-state sponsored intrusions into energy control systems. The primary concerns include finding ways to deter and quickly detect cyber intrusions.

Until recently, attacks on utility facilities garnered little more than local media attention. That changed after the national press wrote about the 2013 attack on Pacific Gas and Electric Co.'s Metcalf substation in California, which a former utility official suggested could have been a test run for a broader strike. The FBI, however, said the attack on the PG&E facility was not part of a terrorist plot.

But all that attention means companies are also more sensitive about what information becomes public.

The DOE in September 2014 proposed to make the narrative portion of the utility emergency incident reports subject to a statistical data law that would essentially prevent the public from accessing that information going forward. The agency also happened to propose the changes while it was processing an SNL Energy Freedom of Information Act public records request for copies of certain form OE-417 utility event reports.

SNL Energy in November 2014 filed comments arguing that the DOE failed to show why the information was not sufficiently protected under FOIA exemptions.

Despite repeated requests, the DOE has yet to release copies of any comments it received on its proposal. The agency also appears to still be processing SNL Energy's November public records request for those comments as well as other related materials and correspondence.

But the DOE has now reversed course and issued a new proposal to continue collecting the data from utilities for another three years but without any changes to Schedule 2.

"Based upon feedback received from the 60-Day Federal Register Notice, The [Office of Electricity Delivery and Energy Reliability] does not intend to proceed with protecting Schedule 2 of Form OE-417 under the Confidential Information Protection and Statistical Efficiency Act of 2002," the DOE said in announcing the change in late 2014. "Instead, OE proposes to maintain the current data protections of the form."

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Department of Energy  
Washington, DC 20585

October 29, 2014

Ms. Esther Whieldon  
SNL Energy  
1700 North Moore Street  
Suite 1110  
Arlington, VA 22209

Via email: ewhieldon@snl.com

Re: HQ-2014-01926-F

Dear Ms. Whieldon:

This is a partial response to the request for information that you sent to the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. You requested the following:

Copies of individual Form OE-417, (electric emergency incident and disturbance report) filings/reports submitted to DOE for the period of January 1, 2003, through April 30, 2014.

Your request was amended on May 8, 2014 to the following search criteria: Final Electric Emergency incident and Disturbance Reports with categories marked physical attack, cyber event or other under box 10 for fiscal year 2013 to the present.

Your request was assigned to the Office of Electricity Delivery and Energy Reliability (OE) to conduct a search of its files for responsive records. OE started its search on May 21, 2014, which is the cutoff date for responsive documents. On September 29, 2014, one-hundred and thirty documents (130) were released to you. On September 30, 2014, an additional forty-one (41) documents were released to you. On September 29, 2014, in a phone conversation with Ms. Veronica Torres and Ms. Angelia Bowman of this office, you agreed to close your FOIA request (HQ-2014-01043-F) with the documents received on the aforementioned dates and convert the remaining portion of your request under a new case number, HQ-2014-01926-F. At this time we have identified sixty-six (66) additional documents responsive to your current request. The documents are being provided to you as described in the accompanying index.

Upon review, OE has determined that certain information should be withheld from the documents pursuant to Exemptions 4 and 7 of the FOIA, 5 U.S.C. § 552 (b)(4), (b)(7)(C).

Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." This exemption is intended to protect the interests of both the government and submitters of information. This exemption affords



protection to submitters who provide commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure. The exemption covers two broad categories of information in Federal agency records: 1) trade secrets, and 2) information that is (a) commercial and financial, and (b) obtained from a person, and (c) privileged and confidential.

The very existence of Exemption 4 encourages submitters to voluntarily furnish useful commercial or financial information to the government and provides the government with an assurance that required submissions will be reliable. The exemption also affords protection to those submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure.

The information being withheld consists of narrative statements that describe the investigative and corrective actions taken by the submitters' network security teams in the event of power outages and contact information for employees that is not publicly available. Further, certain statements in the reports contain references to the names and locations of specific cyber assets and critical infrastructure (e.g., substations and IP addresses) owned and operated by the submitters. Some statements even describe the existing security measures, such as malware detection systems, used by a submitter. This information is considered proprietary and confidential, and releasing it to the public has the potential to harm the competitive standing of the submitter in at least three ways.

First, public release of details concerning the submitters' cyber assets and critical infrastructure would expose submitters to an increased risk of attack. Managing the risk of cyber and physical attacks is a primary competitive concern of OE-417 submitters, and release of details that could help facilitate attacks would cause submitters to incur additional costs to secure their systems. If the risk of attack is realized, submitters would also incur recovery costs, including a potential loss of market share to competitors that did not suffer similar attacks.

Second, public release would provide the submitters' competitors with valuable insights into confidential business practices and company operations—in particular, the investigative protocols, composition of response teams, and prioritization of corrective actions—that could be used to the submitter's disadvantage. These internal protocols are designed to maximize efficiencies and could be used by competitors to gain an advantage over the submitters.

Third, public release would provide submitters' competitors with insights into how the submitters configure their cyber assets and critical infrastructure. This configuration is typically considered confidential information within the electric industry and is not publicly shared to minimize both security and commercial risks. Therefore, this information is being withheld.

Exemption 7 protects from disclosure "records or information compiled for law enforcement purposes" that fall within the purview of one or more of six enumerated categories. To qualify under Exemption 7, the information must have been compiled, either originally or at some later date, for a law enforcement purpose, which includes crime prevention and security measures, even if that is only one of the many purposes for compilation.

Exemption 7(C) provides that, “records of information compiled for law enforcement purposes” may be withheld from disclosure, but only to the extent that the production of such documents “could reasonably be expected to constitute an unwarranted invasion of personal privacy....” 5 U.S.C. § 552(b)(7)(C). In applying Exemption 7(C), DOE considered whether a significant privacy interest would be invaded, whether the release of the information would further the public interest in shedding light on the operations or activities of the Government, and whether in balancing the privacy interests against the public interest, disclosure would constitute unwarranted invasion of privacy and sheds no light on the operations or activities of the government. The information withheld under Exemption 7(C) identifies a law enforcement official conducting an investigation. The individual has a significant privacy interest in his identity, which, if known, could pose a serious safety risk to him, and may result in an unwarranted invasion of privacy. Releasing his identity would reveal little about the operations or activities of the Government. Therefore, disclosure of this information could reasonably be expected to constitute an unwarranted invasion of personal privacy.

This satisfies the standard set forth in the Attorney General’s March 19, 2009 memorandum that the agency is justified in not releasing material that the agency reasonably foresees would harm an interest protected by one of the statutory exemptions. Accordingly, we will not disclose this information.

Pursuant to 10 C.F.R. *Part* 1004.7(b)(2), I am the individual responsible for the determination to withhold the information described above.

This decision, as well as the adequacy of the search, may be appealed within 30 calendar days from your receipt of this letter pursuant to 10 C.F.R. *Part* 1004.8. Appeals should be addressed to Director, Office of Hearings and Appeals, HG-1, L’Enfant Plaza, U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585-1615. The written appeal, including the envelope, must clearly indicate that a FOIA appeal is being made. The appeal must contain all the elements required by 10 C.F.R. *Part* 1004.8, including a copy of the determination letter. Thereafter, judicial review will be available to you in the Federal District Court either (1) in the district where you reside, (2) where you have your principal place of business, (3) where the DOE’s records are situated, or (4) in the District of Columbia.

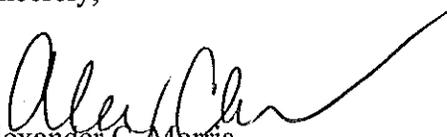
The FOIA provides for the assessment of fees for the processing of requests. 5 U.S.C. § 552(a)(4)(A)(i); 10 C.F.R. *Part* 1004.9(a). In our May 15, 2014 letter, you were advised that your request was placed in the “news media” category for fee purposes. Since DOE’s processing costs for this request did not exceed the minimum amount of \$15.00 at which DOE assesses fees, no fees will be charged for processing this request.

If you have any questions about the processing of the request or this letter, you may contact Ms. Veronica Torres at:

MA-90/ Forrestal Building  
1000 Independence Avenue, S.W.  
Washington, DC 20585  
(202)586-5955

I appreciate the opportunity to assist you with this matter.

Sincerely,



Alexander C. Morris  
FOIA Officer  
Office of Information Resources

Enclosures

## INDEX

Request #: HQ-2014-01926-F

Partial response for request from Ms. Esther Whieldon for:

**Copies of individual Form OE-417, (electric emergency incident and disturbance report) filings/reports submitted to DOE for the period of January 1, 2003, through April 30, 2014.**

**Your request was amended on May 8, 2014 to the following search criteria: Final Electric Emergency incident and Disturbance Reports with categories marked physical attack, cyber event or other under box 10 for fiscal year 2013 to the present.**

At this time, the Office of Electricity Delivery and Energy Reliability (OE) located sixty-six (66) additional documents responsive to your request.

- Twenty-five (25) documents *are being released in their entirety.*
- Forty (40) documents *are being released in part pursuant to Exemption (b)(4).* Exemption 4 information consists of narrative statements that describe the investigative and corrective actions taken by the submitters' network security teams in the event of power outages and contact information for employees that is not publicly available.
- One (1) document *is being released in part pursuant to Exemptions (b)(4) and (b)(7)(C).* Exemption 4 information consists of narrative statements that describe the location of incident. Exemption 7(C) information consists of the name of a law enforcement official conducting an investigation.

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### Electric Disturbance Events (OE-417)

The Electric Emergency Incident and Disturbance Report (Form OE-417) collects information on electric incidents and emergencies. The Department of Energy uses the information to fulfill its overall national security and other energy emergency management responsibilities, as well as for analytical purposes.

The OE-417 Electric Emergency Incident and Disturbance Report (OMB No. 1901-0288) has been updated and was recertified by the Office of Management and Budget in May 2018. The updated version of Form OE-417 incorporates additional questions from the North American Electric Reliability Corporation (NERC) EOP-004 Event Reporting Standard. For NERC reporting entities registered in the United States, NERC has approved that Form OE-417 meets the submittal requirements for NERC; however, please note that there may be other applicable regional, state, and local reporting requirements.

This report is sponsored by the Office of Cybersecurity, Energy Security, and Emergency Response (CESER). Please email [OE417@hq.doe.gov](mailto:OE417@hq.doe.gov) with any questions.

#### OE-417 Online Submissions

**A new OE-417 E-Filing system has been released (August 2012). This new system allows respondents to email submitted Forms to additional recipients as well as to retrieve and update past Forms. The Training Guide for the new system can be found below the E-Filing link.**

- [Online OE-417 Survey Form](#)
- E-Filing System Training ([PDF 1.7 MB](#)) ([DOC 2.8 MB](#))

#### OE-417 Form and Instructions

- Survey Form ([PDF 267 KB](#)) ( [DOCX 51 KB](#) )
- Form Instructions ([PDF 348 KB](#)) ([DOCX 107 KB](#))

#### Annual Summaries

- Current Year Summary ([PDF 269 KB](#)) ([XLS 78 KB](#))
- [Archives](#)

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#### POINT OF CONTACT:

[OE417@hq.doe.gov](mailto:OE417@hq.doe.gov)

Electric utilities that operate as Control Area Operators and/or Reliability Authorities as well as other electric utilities, as appropriate, are required to file the form. The form is a mandatory filing whenever an electrical incident or disturbance is sufficiently large enough to cross the reporting thresholds. Reporting coverage for the Form OE-417 includes all 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and the U.S. Trust Territories.

#### Confidentiality

The incidence and disturbance data reported on Schedule 1 of the form are not confidential. However, all data reported on Schedule 2 of the form (information on the official to contact for follow-up and the narrative description of the incident and disturbance) will be protected, where possible, consistent with Federal law such as the Freedom of Information Act (FOIA).



You will need the [Adobe Acrobat Reader](#) to view the PDFs on this page.

*Last Updated: 5/2018*

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